Supreme Court, U.S.
FILED

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No._____

In the
SUPREME COURT OF THE UNITED STATES

Ronald Gary Kirk, Jr., *Petitioner,*

v.

United States of America, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 1998

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QUESTION PRESENTED

Whether an individual has standing (i.e. possesses a reasonable expectation of privacy) to contest the search of a rented vehicle in which that person was the driver, but was not a registered/authorized driver in the rental agreement, but had express permission to use, possess and drive the vehicle?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

RONALD GARY KIRK, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Ronald Gary Kirk, Jr. respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App., *infra*, 6a-7a) is an unreported opinion at 159 F.3d 1357. The order denying defendant's motion to suppress and exclude evidence with opinion was entered by the District Court on September 22, 1997 (App. *infra*, 1a-5a).

JURISDICTION

The court of appeals entered its judgement (App., *infra*., 6a-7a) on September 23, 1998, and subsequently denied petitioner's petition for rehearing and suggestion for rehearing en banc on October 29, 1998 (App., *infra*., 8a-9a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and the Fourth Amendment to the United States Constitution.

STATEMENT

A. Factual Basis

On February 6, 1997, Officers LaChance and Froman of the Beaumont Police Department initiated a traffic stop for following too closely. The driver and now Petitioner, Ronald Kirk was asked for driver's license and/or identification and registration, which he provided. Officers were informed that the car was rented by the Petitioner's sister and had permission to drive it. The Petitioner was then asked to step outside the vehicle.

An on-scene videotape was created from this point. Officers continued to detain and question both occupants of the vehicle. Ultimately, both a canine and physical search of the vehicle was performed and Petitioner was arrested for possession of marijuana.

B. Proceedings Below

Petitioner was indicted for violations of: 1) 21 U.S.C. §846 & 841(b)(1)(D); 2) 21 U.S.C. §841(a)(1); and, 3) 18 U.S.C. §1029(a)(7).

After a hearing on Petitioner's Motion to Suppress relating directly to the Fourth Amendment issues surrounding

the reasonableness of the stop, detention and search. The District Court specifically found Petitioner to have standing, however subsequently denied Petitioner's motion. The Petitioner entered a plea of guilty to Counts II and III of the indictment in accordance with a Conditional Plea Agreement under Rule 11(a)(2). Appellant specifically appealed the issues surrounding the reasonableness of the stop, detention and search. Respondent argued Petitioner lacked standing to contest these issues.

The Fifth Circuit rendered an unpublished two (2) page opinion on September 23, 1998, (App. *infra*, 6a-7a). The Court's rationale was that the Petitioner "did not have standing to contest the search of the vehicle because he was not an authorized driver of the vehicle and knew that the rental contract prohibited unauthorized drivers from operating it. The Court cites United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990).

Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc. Both were denied on October 29, 1998, (App. *infra*, 8a-9a). Petitioner filed a Motion for Recall and Stay of Mandate on December 4, 1998. This was denied on January 8, 1999. Petitioner now files this his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

The issue of standing is one of extreme importance to any court who is entrusted with the discretion of determining who may exert his/her Fourth Amendment rights against unreasonable search and seizure. The evaluation of the evidence, facts and ultimate determination of standing by the district court is an onerous task without the added burden of wading through conflicting standards and applications of law. At the district court level, conflicting decisions are proliferating rapidly in virtually all circuits, and the need for guidance in this area is acute. The circuit courts' opinions

addressing this issue are filled with conflicting standards and determinations on this issue. The issue of standing is one that is raised and litigated at the district court level on a daily basis and one that is timely presented for review and clarification.

"[T]he Fourth Amendment protects people, not places." But the extent to which the Fourth Amendment protects people may depend upon where those people are. The Court has held that "capacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430 (1978). *See also, generally*, Rawlings v. Kentucky, 448 U.S. 98, 106, 100 S.Ct. 2556 (1980); and, Minnesota v. Carter, --U.S.--, 119 S.Ct. 469 (1998).

I. The Decision In This Matter Is Contrary to the Below-Cited Decisions of the United States Court of Appeals For the Fifth Circuit, As Well As Various Other United States Courts of Appeal Who Are in Direct Conflict and Opposition to This Court's Decision in This Matter.

The Fifth Circuit cites United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990). The *Boruff* opinion specifically stands for the contention that an individual driving a vehicle that has been rented and is not the renter of the vehicle or who is expressly provided for in the rental agreement, has no legitimate expectation of privacy in the vehicle. *See, Boruff*, at 117. Granted, various other decisions in both the Fifth Circuit and others, take the position that a person who is driving a rented vehicle, who is not expressly listed on the rental agreement, does not have a reasonable expectation of privacy in that vehicle and thus cannot demonstrate standing to contest

any search of that vehicle, whether in lawful possession or not. *See generally*, *Boruff*; United States v. Wellons, 32 F.3d 117 (4th Cir. 1994); and United States v. Roper, 918 F.2d 885 (10th Cir. 1990).

Notwithstanding that rational, this court has set forth a two-prong test in determining a person's standing to bring a Fourth Amendment challenge to an allegedly illegal search: 1) Is the person able to establish an actual, subjective expectation of privacy with respect to the place being searched or items being seized; and, 2) Is that expectation of privacy one which society would recognize as objectively reasonable. United States v. Riazco, 91 F.3d 752 (5th Cir. 1996), *citing* United States v. Lee, 898 F.2d 1034, 1037-38 n. 5 (5th Cir. 1990), *cert. denied*, --U.S.--, 113 S.Ct. 1057 (1993).

In its opinion in *Riazco*, the Fifth Circuit noted that it and the Eighth Circuit have held that an individual who has permission from the person to whom the vehicle was rented does indeed have standing. Put another way, that he/she has a possessory interest in the vehicle, a subjective expectation of privacy and an expectation of privacy that society objectively finds reasonable. *See*, United States v. Muhammed, 58 F.3d 353, 355 (8th Cir. 1995) and *Lee*, 898 F.2d 1034 (5th Cir. 1990). The Eighth Circuit has again recognized that an individual does have standing to contest the legality and reasonableness of a search of a rented vehicle if, that person has permission to use the vehicle, United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998) *citing, Muhammed* at 355.

The Fifth Circuit's decision in *Riazco* rested on the fact that the driver did not have the express permission to drive the rented vehicle from the person to whom it was rented. Conversely, the Petitioner was the driver in a rented vehicle, had a possessory interest in the vehicle as he was given care, custody and control over the vehicle from the person listed on the rental agreement, he had express permission from that person to whom it had been rented and thus has standing to contest the illegality of the stop and search of the vehicle.

In a related fact situation, the Eleventh Circuit has recognized that an individual who is stopped and the vehicle that is searched at a time when the rental agreement has expired, has standing to contest the search, United States v. Cooper, 133 F.3d 1394, 1398 (11th Cir 1998). That court even recognizes that the Seventh Circuit has found that a driver using a vehicle with the permission of an absent owner has been found to possess a reasonable expectation of privacy therein, *citing,* United States v. Garcia, 897 F.2d 1413, 1416-18 (7th Cir 1990). The Seventh Circuit also recognizes that the Fifth Circuit has found that this privacy right has been extended to a driver who had the absent renter's permission, *Lee*, at 1038.

Petitioner called as a witness at the hearing on his Motion to Suppress, Hope Virginia Jennings. She testified that the vehicle Petitioner was driving and which was ultimately stopped and searched; had been rented by her from Hertz. She further testified that she gave express permission to Petitioner to drive the vehicle; gave actual possession of the vehicle to Petitioner; and, loaned the vehicle to the Petitioner. Thus, Petitioner adequately satisfied a legitimate possessory interest and expectation of privacy in this vehicle.

II. Consideration By the United States Supreme Court is Necessary to Secure and Maintain Uniformity of Decisions in Not Only the Fifth Circuit, But the Various Other United States Courts of Appeal.

It is evident in reading the rationale of Hon. Joe J. Fisher, that the District Court's opinion in determining Petitioner's standing question was not one grounded on solidly established precedent within the Fifth Circuit. The court's opinion reflects its confusion in the body of caselaw to draw from stating, "[a]t first glance, there appears to be some conflict in the Fifth Circuit as to whether an individual

who is not an authorized driver of a rented vehicle has standing to challenge a search of the vehicle." (App., *infra*, 2a) Although the court attempts to "distill" (App., *infra*, 3a) some clear guidelines surrounding this issue, the court ultimately states:

> ...Kirk does not have standing to object to the search. Nonetheless, given the potentially unsettled nature of the law, and out of an abundance of respect for Kirk's Fourth Amendment rights, the Court will assume that Kirk does have standing and proceed to examine the legality of the search.

App., *infra*, 4a.

It appears from the opinions handed down within the Fourth, Fifth and Tenth Circuits, standing may not vest in this situation. Conversely, the Seventh, Eleventh Circuits and the Fifth Circuit as well, have issued opinions that would recognize Petitioner's right to contest the search of the vehicle. This discrepancy within the Fifth Circuit, coupled with the fact that various other Circuits recognize differing standards urge this Court to accept review and give guidance to insure the application and interpretation of the citizens' Fourth Amendment protections are consistently and fairly applied throughout the United States criminal justice system.

III. The Decision of the Court of Appeal Is Erroneous.

Erroneousness, in the traditional view, of the District Court decision below is not at issue in the determination of granting certiorari in this matter. More importantly, the appellate determination was the erroneous decision that prevented the Petitioner's consideration of those issues to which Petitioner the sought review and relief. The Fifth Circuit's determination that Petitioner lacked standing to assert a Fourth Amendment complaint against an

unreasonable search and seizure alone is an erroneous decision in and of itself. Furthermore, it was not an issue that was part of the original appellate issues presented to the Fifth Circuit for review.

In reviewing this issue the Appellant Court is to review the evidence in the light most favorable to the party who prevailed in the district court, United States v. Cardeneas, 9 F.3d 1139, 1147 (5th Cir. 1993). Specifically relating to this issue, the District Court made its finding that Petitioner had standing to assert his Fourth Amendment right against unreasonable search and seizure.

Granted, the trial court's conclusions of law are reviewed de novo, United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995), *citing*, United States v. Alvarez, 6 F.3d 287, 289 (5th Cir. 1993), however, this is a mixed question of law and fact. Therefore, any decision within the discretion of the District Court should not be disturbed absent abuse of discretion. Fed. Rules Cr. P. Rule 32(e), United States v. Benevides, 793 F.2d 612,616 (5th Cir.), *cert denied*, 479 U.S. 868, 107 S.Ct. 232 (1986). It is an abuse of discretion standard that was to be used in this matter.

Standing to complain of the search was properly established and the trial court entered a finding to that effect on the record. In this particular matter, the District Court not only made a specific finding that Petitioner had sufficient standing, but Respondent failed to argue that the trial court abused its discretion in so finding. There was no finding by the Fifth Circuit that the District Court's factual finding was clearly erroneous in its de novo review of the standing issue.

IV. The Question Presented Is Important.

The question presented to the Court is not only important, but also concise and to the point. Does an individual who is in lawful possession of a vehicle with the express permission of the person who rented the vehicle,

have a reasonable expectation of privacy in that vehicle, such that society would recognize as objectionably reasonable.

As is detailed above, the Circuits are currently not only in disagreement with each other, they themselves seem to vacillate to the degree that the District Courts are left to fashion there own standard of review. This results in extreme variances in the law, such that a citizen's Fourth Amendment rights can be easily stripped away without a proper and fair application of the law to his/her situation.

It is axiomatic that the Fourth Amendment guarantee against unreasonable searches and seizures protects personal privacy interests, not property rights. Thus, the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, at 439 U.S. 128, 143, 99 S.Ct. 421, 430 (1978).

Standing has consistently been a legitimate and relatively fertile ground for this Court's review and clarification especially in light of the Court's continual commitment to the belief that the Fourth Amendment "protects people, not places." Paulino v. United States, 490 U.S. 1052, 1053, 109 S.Ct. 1967, 1968 (1989) *citing*, Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511 (1967).

However, this particular issue is one that is without redress before this Court. Although a question that begs a bright line rule, one has not been previously established or adopted by this Court. Petitioner is now asking this Court to consider this matter as one of first impression and review the lower Circuits' opinions and determine the proper standard to be applied in this instance.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA

VS. **CASE NO. 1:97-CR-38(01)**

RONALD GARY KIRK

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS AND EXCLUDE EVIDENCE

Before the Court is Defendant Ronald Kirk's Motion to Suppress and Exclude Evidence. For the following reasons, the motion is denied.

STANDING

As a threshold matter, the Court must consider whether Kirk has standing to object to the search in question. *See* ***United States v Payner,*** 447 U.S. 727, 731 (1980). In order to have standing, Kirk must show that he had (1) an actual subjective expectation of privacy with respect to the place being searched or items being seized and (2) that his expectation of privacy is one which society would recognize as objectively reasonable. *See* ***United States v. Kye Soo Lee***, 898 F.2d 1034, 1037-38 (5th Cir. 1990).

Kirk was driving a rented vehicle when he was stopped by the police. Kirk, however, had not rented the vehicle himself, and was not listed as an authorized driver on the rental agreement. Instead, the individual who had rented the vehicle had given Kirk permission to drive the car. In the car was a copy

of the rental agreement, which expressly forbade unauthorized drivers from operating the vehicle. Given the fact that Kirk readily produced the rental agreement, the Court finds that Kirk knew of the agreement.

At first glance, there appears to be some conflict in the Fifth Circuit as to whether an individual who is not an authorized driver of a rented vehicle has standing to challenge a search of the vehicle. In ***United States v. Boruff,*** 909 F.2d 111, 117 (5th.Cir.1990), the Fifth Circuit held that when a rental agreement prohibits unauthorized drivers from driving the vehicle, such an unauthorized driver does not have standing to object to a search.[1] Nonetheless, two other Fifth Circuit cases could be read as implying that an unauthorized renter may have standing. See ***United States v. Riazco***, 91 F.3rd 752, 754 (5th Cir.1996); ***Kye Soo Lee***, 898 F.2d at 1037-38. When closely examined, however, the conflict evaporates and several clear rules regarding non-renter standing emerge.

In the recent case of ***Riazco***, 91 F.3d at 754, Judge Smith indicated that a driver who has "obtained permission from the lawful renter...[has] a legitimate expectation of privacy" in the vehicle, and thus, has standing to challenge a search. ***Id*** . While Judge Smith did not expressly adopt the rule that one who borrows the car from an authorized renter has standing, he assumed that was the case. Because the defendant in ***Riazco*** had not borrowed the car from an authorized renter, he did not have standing. ***Riazco*** in no

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[1] "[The defendant] had no legitimate expectation of privacy in the rental car. Under the express terms of the rental agreement,[the renter] was the only legal operator of the vehicle. [The renter] had no authority to give control of the car to [the defendant]... [The defendant] was well aware of these restrictions when he took possession of the car and used it during the smuggling operation. He therefore had no legitimate expectation of privacy in it." ***Boruff***, 909 F.2d at 117.

way should be seen as attempting to overrule ***Boruff***.[2] The two cases concern different situations. ***Riazco*** concerned a driver who had not received the car from the lawful renter. The case, therefore, concerns only that situation. ***Riazco*** stands for the proposition that a non-renter who receives the car from anyone other than the renter cannot have standing to object to the search. ***Boruff***, on the other hand, holds that even a non-renter receiving the vehicle from the lawful renter will not have standing if the rental agreement prohibits unauthorized drivers from operating the vehicle, and the driver knows of that prohibition.

The ***Riazco*** court relied on ***Kye Soo Lee***, 898 F.2d at 1037, a case decided before ***Boruff***. In ***Kye Soo Lee***, an individual was driving a rental truck which he had not rented. The Fifth Circuit held that even though he was not the renter, he could still have standing to object to the search. ***Kye Soo Lee***, however, makes no mention of whether the rental agreement prohibited unauthorized individuals from driving the truck, or whether the defendants knew of that prohibition. ***Kye Soo Lee***, therefore, stands for the proposition that, assuming the rental agreement does not prohibit unauthorized drivers from operating the vehicle, a non-renter who receives the vehicle from the lawful renter can have standing to challenge the search.

To summarize, from these cases we can distill the following rules regarding standing of non-renters driving rented vehicles. An individual who receives a rented vehicle from someone other than the lawful renter has no standing to object to a search of the vehicle. ***See Riazco***, 91 F.3rd at 755. When, however, the rental agreement does not prohibit unauthorized drivers from driving the vehicle, or the driver does not know of the prohibition, the non-renter who has

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[2] One panel of the Fifth Circuit may not overrule another panel, absent intervening Supreme Court precedent or en banc review. See, e.g. Texas Refrigeration supply v. FDIC, 953 F2d 975, 983 (5th Cir.1992).

received the vehicle from the lawful renter does have standing to object to the search. See ***Kye Soo Lee***, 898 F.2d at 1038. When the rental agreement prohibits unauthorized drivers from driving the vehicle, and the unauthorized driver knows of this prohibition, the unauthorized driver has no standing to object to the search of the vehicle. See ***Boruff***, 909 F.2d at 117.

Kirk did not rent the vehicle, but he received it from the lawful renter. Nonetheless, he was not an authorized driver and the rental agreement forbade unauthorized drivers from operating the vehicle, a prohibition of which Kirk was aware. Therefore, the ***Boruff*** rule applies, and Kirk does not have standing to object to the search. Nonetheless, given the potentially unsettled nature of the law, and out of an abundance of respect for Kirk's Fourth Amendment rights, the Court will assume that Kirk does have standing and proceed to examine the legality of the search.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING SEARCH AND SEIZURE

The Court makes the following findings of fact and conclusions of law regarding the search and seizure.

1. The Court assumes that Defendant, Ronald Gary Kirk, Jr., a third party driver of a rental vehicle who was not named as an additional driver on the rental agreement, has standing to contest the search of this particular vehicle based on his possession of the vehicle and having permission from the person who rented the vehicle.

2. The stop was made pursuant to a valid violation of Texas traffic law and thus, was a lawful stop according to ***United States v. Gallo***, 927 F.2d 815, 818 (5th Cir.1991) and ***United States v. Shabazz***, 993 F2d 431, 434 (5th Cir. 1993).

3. Officer Froman developed sufficient reasonable suspicion to continue questioning Kirk and to subsequently request permission to search the vehicle. See ***United States v. Wood***, 106F. 3d 942, 946 (10 Cir.1997).

4. Officer Froman, who is trained and experienced in narcotics interdiction, had specific articulable facts, which, in the aggregate, gave him reasonable suspicion to question these defendants on matters unrelated to the traffic stop, seek consent to search, and detain the car while an officer conducted a dog sniff.

5. Lobo, the drug detecting dog in this case and his handler, Officer Kenneth Karr, were sufficiently trained and certified to detect cocaine at the time of this incident. ***See United States v. Hare***, 932 F.Supp.852 (E.D. Texas, 1996).

6. Lobo alerted to the odor of illegal narcotics on the outside of the vehicle after conducting a perimeter sniff of the vehicle.

7. Lobo is a reliable drug detecting dog and the alert provided Officer Froman with probable
cause to search the vehicle.

The search and seizure did not violate the Fourth Amendment and, accordingly, Kirk's motion to suppress and exclude evidence is **DENIED.**

Signed this 22 day of September, 1997.

/s/ Joe J. Fisher
UNITED STATES DISTIRCT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40020 Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

Versus
RONALD GARY KIRK, JR.,
Defendant, Appellant.

Appeal from the United States District Court for the Eastern District of Texas
USDC No. 1:97-CR-38-1

September 23, 1998

Before DAVIS, BENEVIDES, and PARKER, Circuit Judges.

Appellant, Ronald Gary Kirk, Jr., appeals his conditional guilty-plea conviction for possession with intent to distribute marijuana and possession of an altered telecommunications device. Kirk challenges the district court's denial of his motion to suppress the evidence obtained as a result of the stop and search of the rental car he was driving.

Kirk did not have standing to contest the search of the vehicle because he was not an

authorized driver of the vehicle and knew that the rental contract prohibited unauthorized drivers from operating it. See United States v. Boruff, 909 F.2d 111, 117 (5th Cir. 1990).

AFFIRMED.

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*Pursuant to the 5th Cir. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in the 5th Cir. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40020 Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

Versus
RONALD GARY KIRK, JR.,
Defendant, Appellant.

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09/23/98, 5 Cir., ____, ____F.3d____)

Before DAVIS, BENEVIDES, and PARKER, Ciircuit Judges.

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed.R.App.P and 5th Cir.R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges

who are in regular active service not having voted in favor, (Fed.R.App.P. and 5th Cir.R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
UNITED STATES CIRCUIT JUDGE

REHG-4